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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 131

CARMINE VINCENT PALMIERI,

Petitioner,

vs.

FLORIDA,

Respondent,

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

In this brief the symbol "A" will indicate references to the printed appendix. All emphasis is supplied unless the contrary is indicated.

QUESTION PRESENTED

Based upon the facts as reflected in the printed Appendix, the respondent respectfully rephrases the petitioner's questions and asserts that the following question is determinative of the issues involved herein.

WHETHER FAILURE TO IMMEDIATELY TAKE A PERSON ARRESTED UPON PROBABLE CAUSE BEFORE A MAGISTRATE BARS, UNDER THE FEDERAL CONSTITUTION, IN A STATE PROSECUTION, LINEUP IDENTIFICATION EVIDENCE SECURED DURING DETENTION?

STATEMENT

On March 1, 1965, the petitioner was arrested and detained in the Dade County Jail for armed robbery (A. 28). On March 10, 1965, petitioner was formally charged with armed robbery by an information after he had filed a petition for writ of habeas corpus (A. 1). He was arraigned and pled not guilty on March 16, 1965 (A. 2). A jury trial was had on September 22-23, 1965. At the close of all evidence the petitioner moved for a directed verdict which was denied. Following the verdict of guilty, the petitioner filed a motion for new trial which was also denied (A. 30). The petitioner was sentenced to twenty (20) years at hard labor in the state penitentiary.

He appealed his cause to the Third District Court of Appeal (A. 31). *Palmieri v. State*, 189 So.2d 512 (3rd D.C.A. Fla. 1966). Therein the court affirmed the conviction below (A. 33). However, the question of whether the petitioner's detention was prejudicial was certified to the Florida Supreme Court as a "question of great public interest". The Florida Supreme Court affirmed the judgment of the district court based upon the finding that (1) the petitioner was not *prejudiced* by his detention, (2) no coerced confession was involved, and (3) the McNabb-

Mallory holding was as yet inapplicable to the states (A. 36-37). Petitioner takes this last basis for presenting a federal question to be determined by the United States Supreme Court on certiorari. Asking that the McNabb-Mallory Rule be extended to the States, and expanded to include *all* evidence obtained during pre-magistrate detention—not just coerced confessions—petitioner takes his cause to this Court.

On February 6, 1965, a U-Tote'm of Miami, Inc., grocery store was robbed. The entire robbery took about five minutes (A. 17), during which time the assailant took the store's bank bag filled with monies, and cleaned out the cash register. A total of $135.26 was stolen. The proprietor, Loy Diehl, had received extensive training in identifying individuals as an MP with the Marine Corps (A. 13). Consequently, he was able to describe the sequence of events *and the robber* to a high degree of particularity (A. 12-13).

Immediately following the robbery, the manager reported the incident to the Dade County Sheriff's Department (A. 14). Several days later Detective Kahn, a Sheriff's Deputy, brought over a half dozen photographs to the store; the petitioner was identified at that time from one of these photographs by Loy Diehl (A. 15).

The petitioner was subsequently arrested on March 1, 1965. He was placed in a six-man lineup at about 2:30 A. M., March 2, 1965, and was once more identified by the victim Loy Diehl (A. 15-16). On March 8, 1965, six days later, the petitioner was again placed in a lineup and identified by Ronald Diehl, the victim's son who was also present during the robbery (A. 19-22). This witness was not coached in any way by Detective Kahn (A. 18). The record reveals that the younger Diehl had ample time to view the

robber (A. 16) and was able to make a positive in-court identification based on what he saw at the time of the crime.

Ten days after the arrest following these two lineups and the filing of a petition for writ of habeas corpus, the petitioner was formally charged by information with armed robbery. During this ten-day period, the petitioner was in custody in the Dade County Jail. However, no interrogation of any kind nor any coerced confession resulting from this detention appears anywhere in the record. Furthermore, the record reflects extensive testimony to the effect that both the victim and the witness identified the petitioner in court based upon the *incident* rather than the lineups.

SUMMARY OF ARGUMENT

Rule 5(a) of the Federal Rules of Criminal Procedure as effectuated by *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), does not apply to cases wherein evidence other than confessions or admissions is secured as a result of failure to present an accused before a committing magistrate after arrest. In cases where the detention has produced other evidence, the Court has clearly based its decision on constitutional grounds. The purpose of the McNabb-Mallory Rule has been fulfilled by recent decisions of this Court which afford an accused the protection of the Fifth, Sixth, and Fourteenth Amendments to the federal Constitution.

The McNabb-Mallory Rule is not binding upon the States. The statutory rights encompassed by the rule have been provided to state prisoners by the decisions of this Court.

The petitioner was not prejudiced nor deprived of any constitutional rights because he was not brought before a committing magistrate subsequent to arrest. He was lawfully arrested upon probable cause. The detention period was not a ruse to establish probable cause for the arrest. The detention did not result in a confession or admission. He was not deprived of any Sixth Amendment right because the identification confrontation occurred prior to June 12, 1967. The in-court identification was not based upon or connected with any lineup confrontation. The petitioner has failed to demonstrate any causal connection between the failure to present him before a committing magistrate and his prosecution or conviction.

The conduct of the lineups was not fundamentally unfair as far as being untrustworthy or suggestive. The procedure used was similar to the procedure approved in *Simmons v. United States*, ____ U.S. ____, ____ S. Ct. ____, 19 L.Ed.2d 1247 (1968).

ARGUMENT

THE MCNABB-MALLORY RULE APPLIES ONLY TO CONFESSIONS.

The detention of the petitioner occurred after he was lawfully arrested for the crime of robbery. The morning after his arrest he was placed in a six-man lineup and identified by the victim of the robbery. Six days later, he was again placed in a lineup and identified by a witness to the robbery. Thus, the record reveals that the petitioner participated in *two* lineups directly connected with the crime of which he was convicted. The petitioner was not interrogated nor was any inculpatory statement or confession used against him at trial.

The detention of persons accused of crime has been the subject matter of great concern of this Court as well

as of Congress, the State courts, and the State legislatures. In federal prosecutions, this Court has repeatedly relied upon its supervisory powers over federal criminal procedure and its interpretation of Rule 5(a) of the Federal Rules of Criminal Procedure as effectuated by *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), in eradicating the "evil implications of *secret interrogations* of persons accused of crime". *Mallory*, supra at 453. Although the Court has consistently failed to reach the constitutional considerations of the McNabb-Mallory Rule, it has made it clear that its genesis is laid in the Fifth Amendment privilege against self-incrimination. In *Miranda v. Arizona*, 384 U.S. 436, 463 (1966) it is stated:

> "Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. *These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States.* In *McNabb*, 318 U.S., at 343-344, and in *Mallory*, 354 U.S. at 455-456, *we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.*"

In order to insure that the accused is afforded the privilege in those cases where there is an arrest without a warrant, he is to have a magistrate inform him of the charges placed against him, of his right to retain counsel, and of his right to a preliminary examination. In addition, the magistrate should inform the accused that he is not required to make a statement and that any statement may be used against him. Further, the magistrate shall allow the accused reasonable time and opportunity to consult counsel and shall admit the accused to bail.

While it is conceivable that the "rule" could be extended to situations whereby the evidence secured during detention is other than a confession or admission, this Court has consistently limited its interpretation of the "rule" to confession cases arising out of federal prosecution. In cases where the detention produced other evidence, the Court has clearly based its decisions on constitutional grounds. For example, in both federal and state cases where the detention was a result of an illegal arrest, all evidence secured during the detention is excludable under the due process clause. *Wong Sun v. United States*, 371 U.S. 471 (1963). See *Adams v. United States*, ____ F.2d ____, 3 Cr.L.2305 (D.C. Cir. 1968); *Bynam v. United States*, 262 F.2d 465 (D.C. Cir. 1958).

In addition, where the detention produces identification evidence in violation of the Sixth Amendment or the due process clauses of the Fifth or Fourteenth Amendments, the evidence produced is inadmissible. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

In fact, even in confession cases, where the confession is secured as a result of custodial interrogation, i.e., detention, any violation of the Fifth or Sixth Amendments renders the confession inadmissible. *Miranda v. Arizona*, supra. Finally, in those cases where evidence is secured as a result of any unlawful search and seizure while the accused is detained, such evidence is inadmissible. *Mapp v. Ohio*, 367 U.S. 643 (1961). Therefore, it is indeed unnecessary to protect an accused by means of an extension of the McNabb-Mallory Rule in cases where the evidence secured as a result of detention is other than a confession or admission. It is clear that many of the safeguards afforded a defendant by being brought before a magistrate have been fulfilled by recent decisions of this Court. *Miranda v. Arizona*, supra; *United States v. Wade*, supra; *Gilbert v. California*, supra.

It should be noted that Congress in Title 18 U.S.C. § 3501 (b) (c), also known as the "Omnibus Crime Control and Safe Streets Act of 1968," has rejected the McNabb-Mallory Rule as the sole factor in determining whether a confession is admissible *vel non*.

The petitioner cites *United States v. Klapholz*, 230 F.2d 494 (2d Cir. 1956) for the proposition that any evidence secured by federal agents in violation of Rule 5(a) should be suppressed. It is submitted that this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) decided subsequent to that case, would require a reversal on constitutional grounds and not on a constrained interpretation of the federal rules. See *Cleary v. Bolger*, 371 U.S. 392 (1964).

THE MCNABB-MALLORY RULE IS NOT BINDING UPON THE STATES.

In reviewing state court convictions in which the issue has been the detention of the accused, this Court has never relied upon its supervisory powers of the administration of federal criminal procedure and has stated many times that the McNabb-Mallory Rule is not binding upon the states. *Miranda v. Arizona*, supra; *Stein v. New York*, 346 U.S. 156, 157 (1953); *Gallegos v. Nebraska*, 342 U.S. 55, 63-65, 73 (1951); *Brown v. Allen*, 344 U.S. 443, 476 (1953); *Townsend v. Burke*, 344 U.S. 736, 738 (1948) (dictum). See also *Culombe v. Connecticut*, 367 U.S. 568, 600-601 (1961). However, the Court has more than filled the breach by ruling that prolonged detention in confession cases may be inherently coercive. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Further, in order to deter official lawlessness, the Court has established the right to counsel at the pre-arraignment stage. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964).

Further, the due process clause of the Fourteenth Amendment has always been utilized to prevent the fruits of official lawlessness at the pre-trial stage from being used at trial. *Stovall v. Denno*, supra; *Simmons v. United States*, supra. Hence, the statutory rights provided for an accused by the McNabb-Mallory Rule in federal prosecutions have been afforded to state prisoners by the decisions of this Court. The need for binding the states by the McNabb-Mallory Rule has clearly been obviated.

THE PETITIONER WAS NOT DEPRIVED OF ANY FIFTH OR SIXTH AMENDMENT RIGHTS BY THE FAILURE OF THE ARRESTING OFFICERS TO BRING HIM BEFORE A COMMITTING MAGISTRATE.

The petitioner contends that the failure of the arresting officers to bring him before a committing magistrate without unnecessary delay in violation of § 901.23 Fla. Stat. (1967) resulted in irreparable prejudice to his cause.

It is submitted that the mere failure to take one lawfully arrested before a committing magistrate or mere detention after a lawful arrest on a bailable offense does not prejudice the accused. It is only the events and activities that occurred after the lawful arrest and before the preliminary hearing or arraignment that could possibly prejudice a defendant. If the period of detention is used to gather evidence to establish probable cause for the arrest, the accused's constitutional rights have been violated. However, *this is not true in the case at bar.*

The record herein clearly establishes that the instant arrest was based upon probable cause. The victim of and the witness to the robbery clearly described the physical characteristics of the petitioner to the police on the day of the robbery. Further, the victim picked out the petitioner's picture prior to arrest. It is clear that the petitioner does not attack the arrest as being unlawful nor was the petitioner's detention a result of any primary illegality. Thus, the detention in the instant cause was not a ruse to establish probable cause for the arrest. *Mallory v. United States*, supra.

Further, § 901.23 Fla. Stat. (1967) tracks the language of Rule 5(a) of the Federal Rules of Criminal Procedure, and like its federal counterpart, it was designed to prevent the evils arising out of secret interrogation. Therefore, if the failure to take petitioner before a committing magistrate resulted in a deprivation of his rights, those rights would necessarily arise out of a violation of the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to effective assistance of counsel made applicable to the states through the Fourteenth Amendment. However, in the case at bar, *the detention did not result in a confession or admission.* The *Wade* decision, supra, and *Schmerber v. California,* 384 U.S. 757 (1965), have made it clear that the Fifth Amendment privilege against self-incrimination is not violated by compelling an accused to participate in a lineup during detention. The danger of secrecy also permeates those detentions that result in lineup identifications of the accused.

> "But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontation: 'Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on. . . .' *Miranda v. Arizona,* supra, 384 U.S. at 448, 16 L.Ed.2d at 709, 10 A.L.R. 3rd 974." *Wade v. United States,* supra, 338 U.S. at 230.

Thus, the *Wade* decision afforded the accused the right of counsel at pre-arraignment confrontations. Both petitioner and respondent also agree that the petitioner's right to effective assistance of counsel was not violated in the instant cause because the lineup occurred prior to June 12,

1967. *Stovall v. Denno*, supra. Furthermore, any stigma attached to the lineups due to the fact that counsel was not present was obviated by "clear and convincing evidence that the in court identifications were based upon observations of the suspect other than the lineup identifications." *United States v. Wade*, supra, 388 U.S. at 240.

Assuming, arguendo, that the petitioner was taken before a committing magistrate prior to any lineup identification and released, it is clear, as the Florida Supreme Court's opinion points out,

> "A prosecution may be instituted and maintained regardless of whether such a hearing is or is not held and regardless of whether probable cause to hold the accused for trial is or is not found.' Montgomery v. State (Fla. 1965), 176 So.2d 331, cert. denied, 384 U.S. 1023, 86 S. Ct. 1955, 16 L.Ed. 2d 1026."

See also *Beck v. Washington*, 369 U.S. 541 (1962); *Culombe v. Connecticut*, 367 U.S. 568 (1961).

There is no doubt that there was sufficient probable cause, independent of the lineup identification, to support an arrest and formal charges by the state prosecuting officials. It is submitted that the petitioner has failed to demonstrate prejudice since there was no casual connection between the failure to be taken before a committing magistrate and the fact that he was detained for ten days and identified in two lineups since, independent of the lineup identification, there was sufficient probable cause to support a prosecution and sufficient competent evidence to support a conviction. Therefore, a technical violation of § 901.23 Fla. Stat. cannot be the basis of the petitioner's conviction.

The police could have directly instituted charges based upon the victim's identifying the petitioner's photograph prior to arrest (A. 15). See *Simmons v. United States*, ___ U.S. ___, ___ S. Ct. ___, 19 L.Ed.2d 1247 (1968).

Florida courts have consistently taken the position that a technical violation of Fla. Stat. § 901.23, absent a showing of prejudice flowing therefrom, will not compel a suppression of any evidence obtained. *Baugus v. State*, 141 So.2d 264 (Fla. 1962). This position is *in accord* with the newly-enacted federal standard contained in the Omnibus Safe Streets and Crime Control Act, supra, which alters Rule 5(a) so as to not rest the admissibility *vel non* of any evidence upon literal compliance with Rule 5(a).

The petitioner's assumption that a committing magistrate would have released him is pure speculation. It is indeed more probable that the victim of the robbery, whose accurate description of petitioner was given to the police and whose identification of petitioner's photograph actually caused petitioner's arrest, would have identified the petitioner at the hearing before a magistrate just as he did twenty-five hours after arrest, at the lineup.

Petitioner does not claim that he was not advised of the charge for which he was placed under arrest. Further, he had the advice of counsel sometime during the ten day period of detention (A. 11) as indicated by a petition for writ of habeas corpus filed in his behalf prior to formal charges. Nor does petitioner contend that bail was not available to release him upon arrest. Therefore, the fact that the petitioner was detained after a lawful arrest and participated in two lineups during detention did not prejudice him or deprive him of any of the rights enjoyed under the Fifth and Sixth Amendments.

THE TOTALITY OF THE CIRCUMSTANCES WITH REGARD TO THE LINEUPS WAS NOT SHOWN TO BE FUNDAMENTALLY UNFAIR, AND THUS WAS NOT VIOLATIVE OF THE "DUE PROCESS CLAUSE."

The petitioner was not deprived of due process of law. The first lineup was conducted twenty-five hours after the petitioner's lawful arrest. Six persons including the petitioner participated. The victim was instructed to "view the lineup, take his time, and be sure, and that if he recognized the individual who held him up, to please tell me his number" (A. 24). The victim picked out the petitioner. Six days later, the witness who had not been shown the petitioner's picture was contacted by the police to attend a lineup. He viewed a lineup which consisted of five persons. Although he picked out the smallest man in the lineup, no distinctive differences among the participants were present (A. 21-22). However, it is important to note that neither the victim nor the witness based his in-court identification upon the lineup (A. 13-14, 18-19). The actual circumstances of the lineups were similar to procedures approved and recommended by the Court in *Simmons v. United States*, supra, 19 L.Ed. 2d at 1254, footnote 6.

Indeed, under the factual surroundings of the instant case, it has not been demonstrated that the identification procedures were untrustworthy or suggestive in any way, manner or form.

CONCLUSION

Based upon the foregoing argument and citation of authorities, the respondent urges that the petitioner's conviction be affirmed.

Respectfully submitted,

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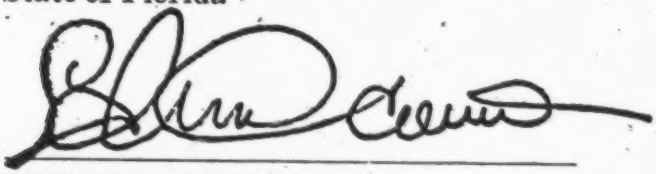

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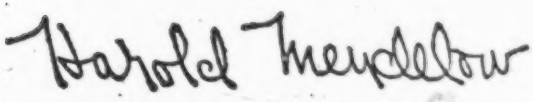

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